No. 74-1643

AUG 20 1975

In the Supreme Court of the United States

OCTOBER TERM, 1975

GEORGE T. APPLEYARD, III
AND JAMES W. CAIN, PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE INTERSTATE COMMERCE COMMISSION IN OPPOSITION

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In September 1969, petitioner Cain, in concert with one Michael Parkhurst, arranged for petitioner Appleyard, an independent truck owner-operator, to transport a shipment of chipboard from North Carolina to the Interstate Commerce Commission building in Washington, D.C. Petitioners concede (Pet. 7) that chipboard is a regulated commodity that can be transported by motor carrier in interstate commerce only by a carrier possessing a certificate of public convenience and necessity issued by the Commission, and that petitioner Appleyard does not possess such a certificate. Petitioners further state (Pet. 8) that the purpose of their September 1969 actions was to demonstrate their opposition to the Commission's administration of Part II (the provisions regarding motor transport) of the Interstate Commerce Act.

The Commission brought suit in the district court seeking to enjoin petitioners from further violations of the Act, and the district court entered a permanent injunction on January 18, 1974 (Pet. App. 43-51). The court of appeals affirmed (Pet. App. 52-55).

The court of appeals correctly characterized (Pet. App. 55) petitioners' claim as "no more than a contention that the public would be better off if the I.C.C. modified its control of interstate motor transportation." Petitioners' contention that the Commission's administration of the Act constitutes unwise economic policy is not of constitutional dimensions; it rests, as petitioners admit, on notions of "substantive due process" (Pet. 38) and this Court has repeatedly held it inappropriate for judicial review of legislative or administrative action to proceed on such a basis. *North Dakota State Board of Pharmacy* v. *Snyder's Drug Stores, Inc.*, 414 U.S. 156; *United States* v. *Carolina Carriers Corp.*, 315 U.S. 475, 489. In any event, as the court of appeals also properly held (Pet. App. 54-55), since petitioner Appleyard has never been refused an operating permit, it could not be presumed that a request would be futile, and thus, Appleyard has shown no legally cognizable injury from the injunction. *Lehon* v. *Atlanta*, 242 U. S. 53, 56.[1]

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[1]Petitioner Appleyard's assertion (Pet. 41) that it is unreasonable for him to hope for a grant of authority from the Commission is at best an allegation of anticipated improper administration that is not ripe for review.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General.

FRITZ R. KAHN,
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AUGUST 1975.